

Blank Page

FILE COPY

Office - Supreme Court, U. S.

FILED

FEB 11 1941

CHARLES CLARE DORSEY  
CLERK

IN THE

# Supreme Court of the United States

October Term, 1940

No. 251

MILLINERY CREATOR'S GUILD INC. (formerly  
MILLINERY QUALITY GUILD, INC.), DAVE  
HERSTEIN COMPANY, G. HOWARD HODGE,  
EDGAR J. LORIE, INC., L. G. MEYERSON,  
INC., VOGUE HAT CO., HARRY SOLOMONS  
and MAY F. SOLOMONS, co-partners trad-  
ing as "HARRY SOLOMONS AND SONS",

*Petitioners,*

*vs.*

FEDERAL TRADE COMMISSION,

*Respondent.*

ON A WRIT OF CERTIORARI TO THE UNITED STATES  
CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

## REPLY BRIEF FOR PETITIONERS.

LOWELL M. BIRRELL,  
*Attorney for Petitioners,*  
27 Cedar Street,  
New York, N. Y.

*Of Counsel:*

CHARLES A. VAN DATTEN.

***Blank Page***

IN THE  
**Supreme Court of the United States**

October Term, 1940

No. 251

MILLINERY CREATOR'S GUILD INC. (formerly  
MILLINERY QUALITY GUILD, INC.), DAVE  
HERSTEIN COMPANY, G. HOWARD HODGE,  
EDGAR J. LORIE, INC., L. G. MEYERSON,  
INC., VOGUE HAT CO., HARRY SOLOMONS  
and MAY F. SOLOMONS, co-partners trad-  
ing as "HARRY SOLOMONS AND SONS",  
*Petitioners.*

*vs.*

FEDERAL TRADE COMMISSION,  
*Respondent.*

ON A WRIT OF CERTIORARI TO THE UNITED STATES  
CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

**REPLY BRIEF FOR PETITIONERS.**

**POINT I.**

**Respondent has agreed that no price fixing or  
manipulation is involved.**

The findings of the Federal Trade Commission regard-  
ing effects on price (R. p. 15) are not only unfounded but  
violate its agreement with counsel.

To save the time and expense to both sides of amassing  
thousands of pages of testimony (R. p. 46) the facts have  
been stipulated (R. pp. 89-96). As a part of this agreement  
with respondent it was understood that it was not claimed  
that petitioners had done anything other than enforce their

campaign against style piracy. This is shown at page 97 of the record where the Examiner made the following statement to counsel for Federal Trade Commission:

"As I understand that," (the stipulation) "just from the one reading, you are agreeing that these Respondents have done nothing in the way of trade restraint except strictly to enforce respect for the styles which they have actually originated."

The answer of counsel for the Commission was:

"That is right."

The findings of the Commission (R. p. 15), and the speculations of the Circuit Court of Appeals (R. pp. 180-181)<sup>1</sup> were thus wholly improper.

The Respondent's present position is not only improper as a violation of its agreement but is unfounded. It is based upon statements made to retailers in an effort to sell them the plan. The sales argument was to the effect that the retailer (not petitioners) could look to protection of his competitive position through elimination of inventory mark-downs caused by the destructive effects of design piracy (R. pp. 115, 117, 163).

Thus both by agreement of counsel and on the facts there is no element of price regulation in this case.

## POINT II.

**Respondent incorrectly assumes that there is a finite number of designs.**

Respondent is incorrect in its assumption that there is a finite number of designs. The number variations upon

---

<sup>1</sup> As we have shown, such speculations were based on testimony which was not a part of the record against the petitioners. (Petitioners' Brief, p. 32.)

the theme is infinite just as are the patterns formed in a kaleidoscope or in a crystalline structure of a snow flake.

It is upon this false premise that Respondent bases its monopoly argument. The argument falls with the premise. There is no attempt to monopolize any part of the millinery trade.

There is no pooling of designs or other objectionable practice. Purely and simply the situation is that a number of creators of designs who are in active competition (R. pp. 90, 91) are seeking to protect themselves against the appropriation and destruction of the benefits of their skill and investment.

### POINT III.

**Respondent's analysis of petitioners' position regarding *Cheney Bros. v. Doris Silk Corp.*, 35 Fed. (2nd) 279 is incorrect.**

Respondent is incorrect in stating that we do not contest the correctness of *Cheney Bros. v. Doris Silk Corp.*, 35 Fed. (2nd) 279.

As pointed out on page 30 of Petitioners' Brief it is our contention that that case is out of line with the decision of this Court in *International News Service v. Associated Press*, 248 U. S. 215, as well as a number of other cases.

With respect to the *Cheney* case (*supra*) it should be noted, however, that there the Court was asked to intervene on plaintiff's behalf and decided a question of artistic design. The Court recognizing that it was a "lame answer" merely declined to intervene in a field which it felt was not qualified to act. (See also the concluding paragraph of Mr. Justice BRANDEIS' dissent in *International News Service v. Associated Press*, 248 U. S. 215.)

As we have pointed out, whether these subtle questions of artistic designs come to the courts through unfair com-

petition or through infringement suits under appropriate legislation the problem is the same. The delays, expense and problem of finding the pirate make either solution impractical and in either event a serious burden would be placed upon the courts.

Thus a most intensive and comprehensive study of this problem has led to the following conclusion:

"The *sine qua non* of a successful plan based upon 'trade novelty' is the existence of a tribunal having thorough knowledge of the products of the trade and the power to make decisions acceptable by the parties concerned or capable of backing by legal sanction. In general, such a plan is adaptable only to voluntary efforts toward design control. It is wholly unadaptable to a permanent legal control."<sup>2</sup>

### **Conclusion.**

*It is respectfully submitted the Cease and Desist order of the Federal Trade Commission and the order of the Circuit Court of Appeals, Second Circuit, affirming the said order should be reversed.*

Respectfully submitted,

LOWELL M. BIRRELL,  
*Attorney for Petitioners.*

*Of Counsel:*

CHARLES A. VAN PATTEN.

---

<sup>2</sup> Johnston & Fitch N. R. A. Work Materials Div. (1936) Bulletin 52, p. 208.

***Blank Page***